No. 22092

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD R. CLEMENTS, Trustee in Bankruptcy of the Bankrupt Estates of STONE MOUNTAIN SNIDER, dba SNIDER FAMILY MARKETS, and RUBY E. SNIDER,

Plaintiff,

vs.

AUSTIN T. SNIDER and ANGELINE M. SNIDER, dba SNIDER FAMILY MARKETS,

Defendants.

APPELLANT'S OPENING BRIEF.

RICHARD M. MONEYMAKER,
650 South Spring Street,
Los Angeles, Calif. 90014,
Attorney for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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AUSTIN T. SNIDER and ANGELINE M. SNIDER, dba SNIDER FAMILY MARKETS,

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APPELLANT'S OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final judgment made and entered in the U. S. District Court for the Southern District of California, Central Division (now Central District of California), and this appeal is prosecuted in accordance with the provisions of Rule 72 *et seq.* of the Federal Rules of Civil Procedure in the United States District Court.

On January 28, 1966, Stone Mountain Snider and Ruby E. Snider doing business as Snider Family Markets filed a voluntary petition in bankruptcy.

On June 22, 1966, the Trustee in Bankruptcy, Appellant herein, filed a complaint for the Recovery of a Preferential Transfer [Clk. Tr. p. 2].

On August 3, 1966, Austin T. Snider and Angeline M. Snider filed an Answer to the Complaint [Clk. Tr. p. 8].

On May 5, 1967, Austin T. Snider and Angeline M. Snider filed a Notice of Motion for Summary Judgment by Defendants, Memorandum of Points and Authorities and Affidavits of Austin T. Snider, Stone Mountain Snider and Harvey S. Krieger in Support Thereof, and Proposed Findings of Fact and Conclusions of Law and Proposed Summary Judgment [Clk. Tr. p. 11].

On May 17, 1967, the Appellant filed his Statement of Genuine Issue of Fact and Law [Clk. Tr. p. 58].

On May 18, 1967, the Motion for Summary Judgment was heard before the Honorable A. Andrew Hauk, Presiding Judge of the United States District Court. Judge Hauk ruled from the bench in favor of Appellees.

On May 23, 1967, Findings of Fact, Conclusions of Law and Summary Judgment was entered [Clk. Tr. p. 70].

On May 23, 1967, Notice of Signing and Filing of Judgment was filed.

On May 25, 1967, Notice of Appeal was filed by Appellant, together with Statement of Points on Appeal [Clk. Tr. pp. 72-76].

Statement of Case.

On August 15, 1964, the bankrupts purchased a business known as the Snider Family Markets from Austin T. Snider and Angeline M. Snider. Stone Mountain is the brother of Austin. On that date the bankrupts and the defendants executed certain documents in the office of Harvey S. Krieger, attorney for the defendants. The documents included a promissory note in the sum of $42,000.00, secured by a chattel mortgage encumbering all of the fixtures, inventory, equipment and other assets.

The chattel mortgage was acknowledged before Harvey S. Krieger, as notary public. The date set forth in the certificate of acknowledgment and the chattel mortgage is August 10, 1964. The defendants, Austin T. Snider and Angeline M. Snider, filed, recorded and published a notice of Intended Sale and Intended Mortgage, stating that the documents would be executed and the consideration paid on August 10, 1964.

It is admitted the execution and acknowledgment of the instruments occurred five days later, on August 15, 1964.

On December 24, 1965, after the bankrupts encountered financial difficulties, and became insolvent, the defendants, Austin T. Snider and Angeline M. Snider repossessed all of the fixtures, equipment and other assets of the business, and cancelled the promissory note.

On January 28, 1966, Stone Mountain and Ruby E. Snider filed voluntary petitions in bankruptcy. The Trustee in bankruptcy sued Austin T. Snider and his wife upon the theory that their chattel mortgage was invalid as to creditors because not properly acknowledged, and thus defective under Section 2957 of the Civil Code of California; and thus their security was not perfected until they repossessed it within four months of bankruptcy; and that the repossession by them within four months of bankruptcy was a preferential transfer voidable pursuant to Section 60 of the Bankruptcy Act (11 U.S.C. 96).

Appellant concedes that if the mortgage was properly acknowledged so as to comply with the law of California, then summary judgment was proper.

ARGUMENT.

POINT I.

The Chattel Mortgage Was Improperly Acknowledged, and Thus Defective as to Creditors.

The certificate of acknowledgment of the chattel mortgage contained a false statement, which all parties knew was false at the time they executed the documents. This clearly renders the chattel mortgage defective.

The provisions of the Civil Code relating to chattel mortgages should be strictly construed, since they give a special right of lien independent of possession, a situation unknown to the commonlaw with relation to personal property.

> *Kahriman v. Jones,* 203 Cal. 254, 255, 263 Pac. 537 (1928).

Civil Code Section 2957 (now repealed by the Commercial Code of California) provides in part:

> A mortgage of personal property . . . is void as against creditors of the mortgagor, and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:
>
> 1. It is acknowledged, or proved and certified, in like manner as grants of real property:

The requisites for the act of acknowledgment are set forth in Sections 1185, 1188, and 1189 of the Civil Code.

> *Martin v. Crocker-Citizens National Bank,* 349 F. 2d 580, 582 (9 CA 1965).

Section 1185 of the Civil Code defines the act of Acknowledgment and states:

> The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf.

However, the section which sets forth the requirements of the Acknowledgment is Section 1189, which defines the form of the certificates. It states in part:

> The certificate of acknowledgment, unless it is otherwise in this article provided, must be substantially in the following form:
>
> State of .....,)
>) ss
> County of .....,)
>
> "On this .... day of ....., in the year ....., before me (here insert name and quality of the officer), personally appeared ...., known to me (or proved to me on the oath of .....) to be/the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same."

This case falls squarely within the ruling of *Martin v. Crocker-Citizens National Bank,* 349 F. 2d 580 (9 CA 1965). In that case, as here, the controversy

was between the trustee in bankruptcy and the chattel mortgagees, who had made the false statements. There, as here, the certificate contained knowingly false statements. The only distinction, is that in the *Martin* case, the certificate of the notary was false because it stated the signators had personally appeared before the notary, when they had not. In this case the certificate of the notary falsely stated the signators appeared before him on August 10, 1964, the date published and recorded in the Notices, when in fact they did not appear until August 15, 1964.

Judge Hauk at the hearing on the motion for summary judgment indicated that without a claim of prejudice or injury by creditors by reason of the false date, the trustee in bankruptcy could not complain. This ignores the clear language of this court in the *Martin* case;

> We think then, that at least as to existing creditors, the requirement of Civil Code Section 2957 that chattel mortgages be acknowledged in order to be valid prescribes a necessary step in the creation of the lien of the chattel mortgage itself, and not a method of giving constructive notice of an otherwise valid lien (p. 582).

In *Emeric v. Alvarado,* 90 Cal. 444, 478, 27 Pac. 356 (1891) an acknowledgment was ruled defective and void where the certificate incorrectly described the City and County of the Notary. The court held the acknowledgment defective because "material statements" were untrue.

The only excuse or reason given for swearing to this false statement is found on page 3 of the Affidavit of the Notary Public, Harvey Krieger [Transcript of Record, p. 51, lines 24-31]. He states:

> That it was not convenient for all parties to be present at the same time for execution of these documents on Monday, August 10, 1964, as originally contemplated, and it was necessary to then re-schedule an appointment for such purpose. An appointment was scheduled for Saturday morning, August 15, 1964, at 8:00 A.M., for all of said parties to be present in affiant's office for the purpose of executing said documents, which said date and times was ultimately the first convenient date and time on and after August 10, 1964, during which all parties could be present.

By this affidavit the Notary Public admits to the commission of a misdemeanor under Government Code Section 6203. It provides:

> Every officer authorized by law to make or give any certificate or other writing is guilty of a misdemeanor if he makes and delivers as true any certificate or writing containing statements which he knows to be false.

This proscription in the Government Code is not restricted only to false statement concerning the personal appearance of a signator before the notary but to "statements" in general.

POINT II.

Decisions in Other Jurisdictions Are Not Applicable Upon the Issue of the False Certificate of Acknowledgment.

While there are no California decisions dealing precisely with the issue of a knowingly false date in the certificate, there has been a decision on related facts in another state. However, *Martin v. Crocker-Citizens National Bank (supra)* points out why non-California decisions are not persuasive authority on this issue.

> In the instant case the defect was caused by the chattel mortgagee itself, the bank. On its premises, and under the supervision of its agents, the officers of the mortgagor were allowed to depart without having acknowledged their signatures. Under supervision of the bank's agents, a notary later made a false certificate that the mortgagor's officers had acknowledged their execution of the instrument. If such a complete disregard of the California statutes is to be treated as irrelevant, not for the protection of an innocent third person, but for the benefit of the party who so disregarded the statutes, it should be the California courts, and not the courts of another sovereign, which should announce that doctrine (p. 583).

The case dealing with the issue of a false date is *Tenney Co. v. Thomas,* 237 N.W. 710, 61 N.D. 202 (1931). There the Supreme Court of North Dakota held an acknowledgment valid even though the certificate's date was intentionally false. The court reasoned:

> We think, however, that the date is not an essential matter. The identity of the mortgagor, and the fact of acknowledgment are the material facts.

But a careful reading of the case demonstrates that it was not the chattel mortgagee who caused the false certificate to be made, but his brother; the chattel mortgagor. The mortgagor antedated the instrument in an attempt to prefer his brother and mortgagee as a creditor, without the chattel mortgagee's knowledge. This distinguishes that case on the facts from both the case at hand and the *Martin* case.

Furthermore, the case is clearly contrary to the decisions of California, such as *Kelsey v. Dunlap,* 7 Cal. 160 (1856), *Bryan v. Ramirez,* 8 Cal. 461 (1858), *Emeric v. Alvarado (supra)* and *Rolando v. Everitt,* 72 Cal. App. 2d 629, 165 P. 2d 33 (1946), all of which stress compliance with the form of the certificate set forth in Civil Code Sections 1188 and 1189.

It is clear from the facts of this case that after defendants had recorded and published their notice of sale, they wished to create the impression the instruments were actually executed and the consideration paid on August 10, 1964. They deliberately participated with their agent, the notary, in executing a false certificate of acknowledgment. Thus the entire act was tainted and the mortgage was void.

Dated: This 27th day of November, 1967.

Respectfully submitted,

Richard M. Moneymaker,
Attorney for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD M. MONEYMAKER